No. 78-1913

In the
Supreme Court of the United States
OCTOBER TERM, 1979

ROBERT G. MYTNIK,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

ROBERT G. MYTNIK,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Robert G. Mytnik, respectfully prays that a writ of certiorari be issued to review the decision in this case made by the Appellate Court of Illinois.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, is reported as *People of the State of Illinois* v. *Robert G. Mytnik,* 66 Ill. App. 3d 624, 384 N.E. 2d 435, 23 Ill. Dec. 641 (1978), and is set forth herein as Appendix A.

JURISDICTION

The Appellate Court of Illinois, First Judicial District, entered its judgment on November 15, 1978 affirming Petitioner's August 30, 1977 conviction. [App. A] Petitioner's timely petition to that Court for a rehearing was denied on December 13, 1978. [App. B] Thereafter, Petitioner's timely petition for leave to appeal to the Illinois Supreme Court was denied on March 29, 1979. [App. C]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the trial judge, in sentencing Petitioner on a conviction of misdemeanor battery, violated Petitioner's constitutional right to due process by relying on assumptions regarding Petitioner's behavior which were materially false and which were based upon improper out-of-court information.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; . . .

Article 1, Section II of the Illinois Constitution provides in pertinent part:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

The Illinois Criminal Code, *Ill. Rev. Stat.* Chap. 38, Section 12-3 (1973), provides:

> (a) A person commits a battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual
>
> (b) Sentence
>
> Battery is a Class A misdemeanor.

The Illinois Criminal Code, *Ill. Rev. Stat.* Chap. 38, Section 116-1 (1964), provides in pertinent part:

> (b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict . . .

The Illinois Criminal Code, *Ill. Rev. Stat.* Chap. 38, Section 1005-8-3 (1975), provides in pertinent part:

> (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:
>
> (1) for a Class A misdemeanor, for any term less than one year . . .

STATEMENT OF THE CASE

Petitioner was charged in a misdemeanor complaint with simple battery, the complaint charging that he ". . . intentionally, without legal justification, made contact with Laura Spalla by grapping [sic] her by the arms and pulling her toward him."

Petitioner was found guilty after a bench trial on August 30, 1977 before the Honorable Calvin C. Campbell,[1] who sentenced the Petitioner to one year in the House of Corrections. Three days later, during the court's hearing on Petitioner's post-trial motions, this sentence was reduced to six months incarceration.

Petitioner appealed the trial court's decision and sentence to the Appellate Court of Illinois First Judicial District, raising the issue, among others, of whether he was denied a fair trial by the inflammatory and improper comments of the prosecutor which caused the trial court to make use of newspaper articles not of record and sentence Petitioner for a sex offense he was neither charged with nor convicted of. On November 15, 1978, the Appellate Court filed an Opinion affirming the conviction and the sentence. [App. A]. One judge dissented as to sentencing, finding that the trial court's comments at the time of sentencing indicated that the court was motivated by a sex crime which did not occur, rather than the simple battery for which Petitioner was convicted. [App. A].

[1] At the time of the trial, Judge Campbell had been on the bench for two and one half months, having been appointed on June 15, 1977, 8 *Jud. Admin. Newsletter,* no. 2, p. 1 (Aug. 1977).

On December 6, 1978, Petitioner filed a Petition for Rehearing, arguing that, contrary to the finding by the Appellate Court in its majority opinion, Petitioner had met his burden of rebutting the presumption that the trial court was not influenced by incompetent evidence and thus had established he was sentenced on the basis of improper factors and erroneous information. The Appellate Court denied this Petition on December 13, 1978. [App. B] On January 16, 1979, Petitioner filed a Petition for Leave to Appeal in the Supreme Court of Illinois, arguing that the trial court violated his constitutional and statutory rights. The Supreme Court of Illinois denied the Petition on March 29, 1979. [App. C]. The Illinois Supreme Court issued its mandate in this cause on April 23, 1979. [App. D]. The Appellate Court of Illinois granted Petitioner's Motion to Stay Mandate on May 2, 1979, [App. E], pending this Court's decision on Petitioner's petition for writ of *certiorari.*

REASONS FOR GRANTING THE WRIT

The Trial Judge, in Sentencing Petitioner on A Conviction of Misdemeanor Battery, Violated Petitioner's Constitutional Right to Due Process by Relying on Assumptions Regarding Petitioner's Behavior Which Were Materially Untrue and Which Were Based upon Improper Out-of-Court Information.

Over thirty years ago, this Court recognized the principle that a defendant is entitled to due process at his sentencing. *Townsend* v. *Burke,* 334 U.S. 736 (1948). Moreover, this Court has stated that while a sentencing judge has broad discretionary authority to avail himself of out-of-court information in determining a sentence, this discretionary power is susceptible to abuse. *Williams* v. *New York,* 337 U.S. 241 (1949). Such a due process abuse occurs when a sentencing judge bases his decision on out-of-court information which is extensively and materially false, as in the *Townsend* case where the sentencing judge inaccurately assumed or was led to believe the defendant's prior criminal charges were in fact convictions. *Townsend* v. *Burke, supra* at 740-741. Another example of such abuse occurred in *United States* v. *Tucker,* 404 U.S. 443 (1972), wherein this Court held that the sentencing judge's consideration of the defendant's previous felony convictions constituted a due process violation, since those convictions were later ruled to have been constitutionally infirm. In *Tucker,* this Court affirmed an order of the Ninth Circuit Court of Appeals remanding the case for resentencing since the sentence was based on assumptions which were materially untrue and, absent consideration of those false assumptions, the factual circumstances of the defendant's background would appear in a dramatically different light. *United States* v. *Tucker, supra* at 447-448. The instant case falls within the principles enunciated in *Tucker* and *Townsend* since the sentencing judge relied upon out-of-court information in making materially false assumptions about the Petitioner's behavior. Consequently, Petitioner was sentenced in a manner which violated his due process rights. In order to avoid a grave miscarriage of justice caused by a decision unduly harsh in its impact, Petitioner requests that this court grant his petition and order that his case be remanded for resentencing.

A misdemeanor complaint charged Petitioner with committing a battery on Laura Spalla on July 6, 1977, in violation of *Ill. Rev. Stat* ch. 38, § 12-3 (a) (1973). The case was tried to the court without a jury on August 30, 1977. The complaining witness and her friend, twelve and thirteen years old, respectively, testified that at about one o'clock in the afternoon of July 6, 1977, as they were walking down a Chicago street, a man they identified as Petitioner stopped his car and asked them if they wanted a ride. [R. 4, 11-12].[2] They further testified that after they refused the offer, Petitioner got out of his car, approached the complaining witness from behind and placed one hand on each of her shoulders. [R. 4-7, 12]. The girls then punched and pinched Petitioner and jumped on his back until he said, "Okay, girls," walked back to his car and drove away. [R. 7, 12-13]. They took down his license plate number which they reported to a policeman. [R. 7, 13].

The only other State witness was a Chicago Police Officer who testified that on July 7, 1977, he traced the license plate number, called Petitioner's office and met with Petitioner on July 7, during which time Petitioner told

[2] [R.] refers to proceedings had on August 30, 1977. [P.] refers to post-trial proceedings had on September 2, 1977.

the Officer he saw the girls but never left his automobile. [R. 17-20].

Petitioner testified on his own behalf, stating that he saw the girls twice on July 6, 1977, once at a restaurant where the girls winked and smiled at him, and later when he offered them a ride. [R. 26, 29]. When they declined, he drove away without getting out of his car. [R. 31]. Petitioner further testified that he was thirty-nine years old, married with two children and steadily employed as a field manager and sales representative for an insurance firm. [R. 24, 25].

During her closing argument, the Assistant State's Attorney ruminated:

> I wonder what would of [sic] happened if Laura had been out there all by herself that day walking down the street and this thirty-nine-year old man pulled her in that car. [R. 39].

This first of many *ad terrorem* appeals by the prosecutor, wherein she mischaracterized the facts of the case in an inflammatory fashion, had a profound and prejudicial effect upon the trial judge. The above statement resulted in the trial judge's denying Petitioner the statutory thirty day period for filing post-trial motions as established by *Ill. Rev. Stat.* ch. 38, § 116-1 (1964). Instead, during a hearing at the close of the trial, the trial judge reluctantly allowed Petitioner only *three days* to prepare and file his post-trial motions. The judge stated:

> [W]e have a forthcoming holiday coming up and I am not going to make it possible for this defendant, by any order that I enter, unless your motion prevails. He was riding out in that area two days after the Fourth of July. We have another holiday coming up this weekend, and I am not anticipating [sic] your motion. I am not going to grant any extension of time to this defendant. [R. 43].

The court's unwarranted statement indicates its unjustified belief that since Petitioner was charged with a battery on July 6, 1917, two days after the Fourth of July, he would likely commit another violation two days after Labor Day, September 5, 1977.

At this same hearing at the close of the trial, the judge asked for matters in aggravation and mitigation of sentencing. [R. 39]. The prosecutor, acknowledging that this was Petitioner's first arrest, recommended a sentence of one year incarceration and asked the court to deny petitioner an appeal bond. [R. 39]. Counsel to Petitioner informed the court that not only had Petitioner never been arrested before, but also that he has an honorable military record, he has been employed all his life, and is the sole support of his wife and children. [R. 40]. In total disregard of these factors, the trial court sentenced Petitioner to what it understood to be the maximum sentence, one year incarceration. [R. 42]. In fact, this sentence was in excess of the statutory limit set by *Ill. Rev. Stat.* ch. 38, § 1005-8-3(a) (1) (1975), which provides that a sentence of imprisonment for a Class A misdemeanor shall be for any term *less* than one year.

Three days later, on September 2, 1977, the trial court held a hearing on Petitioner's post-trial motions, at which time the prosecutor again inflamed the passions of the trial judge by transforming Petitioner's conviction for simple battery into a conviction for a sex offense, when she asserted:

> [A girl of] twelve years old should be able to walk down any street in the City of Chicago, State of Illinois, and County of Cook.

> She should not be grabbed by anyone. It was my feeling now as it was then, that if her friend was not with her Erin O'Doheiety [sic] *I am not sure that we would have had a battery charge. I am not sure we would of* [*sic*] *had either one of the girls with us today.* [P. 14]. [Emphasis added].

The fact that the trial judge was improperly influenced by the prosecutor's repeated and uncalled for inflammatory references to the sexual molesting of the complaining witness and her friend is clearly illustrated by the trial judge's comments, made just after he reduced Petitioner's sentence to six months incarceration:

> Do we agree with the State's Attorney to make argument about what happened and what did not happen. [sic]. Of course, the Court cannot consider the fact that her friend was alone. I think the Court commented on this the other day. *The fact that if her younger friend was alone this would of* [*sic*] *ended up in a very serious matter. One only has to read the newspapers this week to take into consideration what could of* [*sic*] *happened to young people and children.* [P. 25-26].

The judge's comment obviously related to certain newspaper articles in the Chicago morning newspapers on August 30, 1977, the day of the trial. Banner front page headlines in the *Chicago Sun-Times* ("MISSING N. SIDE GIRL FOUND DEAD") and the *Chicago Tribune* ("FIND MISSING N. SIDE GIRL'S BODY IN SKOKIE") were followed by stories concerning the discovery of the body of a sixteen-year-old girl in Skokie, Illinois, as well as the murder of a twelve-year-old girl in Lake County, Illinois, whose body was found August 26, 1977.

The significance of the trial judge's expressed and explicit concern over what might have, but did not in fact, happen is not mitigated by his statement "This is not part of the case," [R. 26], as pointed out by Judge Simon of the Illinois Appellate Court in his dissenting opinion. [App. A]. The trial judge, himself, by referring to newspaper articles not matters of record, improperly made the articles part of his sentencing deliberations. Moreover, in reducing Petitioner's sentence from one year to six months, the trial judge, again expressly, stated that he did so not out of sympathy for Petitioner, or for Petitioner's benefit, but only for the benefit of his family. [P. 24-25]. In so stating, the trial judge revealed the full extent to which he had abused his discretion and relied upon his materially inaccurate assumptions regarding what might have happened. Despite the explicit mandate of Article 1, § 11 of the Illinois Constitution, which states that "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship," the trial judge refused to sentence Petitioner on a conviction for a simple misdemeanor battery in which no one was hurt.[3] Moreover, he refused to consider the excellent rehabilitative potential of a first offender who, the trial judge was aware, had a previously spotless criminal record, received an honorable discharge from the Army in 1959 with a rank of corporal, served sixteen months in Korea as a

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[3] To no avail, defense counsel informed the trial judge of decisions in similar Illinois simple battery cases where the courts held that since no blows were struck and no physical injury occurred, imposition of jail sentences were excesive and unwarranted. *People* v. *Gimmler,* 45 Ill.App. 3d 440, 361 N.E.2d 44 (1977); *People* v. *Vaseska,* 74 Ill. App. 2d 297, 220 N.E.2d 248 (1966).

combat construction specialist engineer, had been gainfully employed in the insurance industry since his discharge from the Army (a period of nineteen years), and is the sole support of his wife and two children. The trial judge was aware of all these factors but, because he was so inspired and inflamed by the prosecutor to sentence Petitioner for a sex offense not even charged, he did not listen. Indeed, the trial judge focused so completely on the uncharged, unproven sex offense that he travelled well beyond the prejudicial in-court arguments of the prosecutor to rely on even more prejudicial out-of-court information which he, himself, found in recent newspaper articles.

The trial judge's reliance on this out-of-court information is an even more egregious violation of Petitioner's due process rights than the abuses condemned by this Court in *Townsend* v. *Burke,* 334 U.S. 736 (1948), and *United States* v. *Tucker,* 404 U.S. 443 (1972). In *Townsend,* the trial judge, at the time of sentencing, was either misinformed by the prosecutor or misread the record concerning the defendant's prior offenses. In *Tucker,* the trial judge was unaware of the constitutional infirmity of the defendant's prior convictions on which the trial judge in part based his sentence. In neither case did these sentencing judges base their materially incorrect assumptions on extrinsic matters not of record which they, themselves, brought into the courtroom. But that is precisely the case here, where the sentencing judge refused to grant Petitioner his statutory thirty-day period for filing post-trial motions, based on his premonition Petitioner would commit a similar offense during another holiday weekend; where the sentencing judge initially sentenced Petitioner to a period in excess of the statutory

limit; where the sentencing judge made what amounts to a token reduction of that sentence in express disregard of the standards enunciated in the Illinois Constitution; where the sentencing judge expressly and repeatedly concerned himself with what might have happened to the complaining witness had she been alone; where the sentencing judge reinforced his totally unwarranted concern by means of recent newspaper articles illustrating to him "what could of [sic] happened." [R. 39, 43; P. 26].

The sentencing judge's prejudicial and inaccurate preoccupations resulted in his sentencing Petitioner for a sex offense neither charged nor proven, not for the simple battery of which Petitioner was convicted. The sentencing judge's disregard of the factual circumstances of Petitioner's background and his repeated utilization of his assumptions concerning Petitioner's behavior which were materially untrue, thus deprived Petitioner of his constitutional right to due process.

CONCLUSION

Without consideration of "what might have happened" and without reliance upon prejudicial newspaper articles *de hors* the record, the factual circumstances of Petitioner's background would have appeared in a dramatically different light at the sentencing proceeding. Since the sentencing judge imposed sentence on misinformation of a constitutional magnitude, he deprived Petitioner of his due process and statutory sentencing rights.

For these reasons, and in order to avoid a grave miscarriage of justice caused by a decision unduly harsh in its impact, Petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDIX

APPENDIX A: Decision And Opinions Of Appellate Court Of Illinois

77-1642

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

ROBERT G. MYTNIK,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable CALVIN C. CAMPBELL, *Judge Presiding.*

MISS JUSTICE MCGILLICUDDY DELIVERED THE OPINION OF THE COURT:

Following a bench trial the defendant, Robert G. Mytnik, was convicted of the offense of battery (Ill.Rev. Stat., 1977, ch. 38, par. 12-3(a)), and sentenced to six months in the House of Correction. The defendant contends on appeal that (1) he was not proved guilty beyond a reasonable doubt, (2) he was unfairly prejudiced by inflammatory and improper remarks of the prosecutor, (3) the trial court prejudicially restricted his right to cross-examine a witness, and (4) his sentence was excessive.

The complainant, a 12-year-old girl, testified that on July 6, 1977, at 1:00 p.m., she was walking south on Artesian between 111th and 112th Streets in Chicago. She stated that the defendant, who was driving in a northerly direction, stopped his car to ask her what she was doing and if she needed a ride. The complainant declined and started to walk away. The defendant got out of his car, grabbed her shoulders from behind and pulled her toward him. The complainant screamed and her 13-year-old girl friend ran to them and jumped on

his back. The 13-year-old girl bit the defendant while the complainant pinched his arms. The complainant stated that the defendant said, "Okay, girls," got back into his car and drove off.

The complainant's testimony was corroborated by her friend, who added that just prior to the incident she and the complainant were in a restaurant. The defendant was at a nearby table and attracted their attention by making noises and winking at them. When they left the restaurant and walked south on Artesian, the witness stopped to pet a dog and heard the complainant cry out. She went to the girl's assistance and jumped on the defendant's back. After a further struggle, the defendant drove off and the witness stopped a police car and told them of the incident. The complainant also gave the police the license number of the defendant's car.

Police Officer William Towns testified that on July 7, 1977, he checked the license number and learned that it was registered to a company. When he called the company he was told that the driver would contact him. The defendant called and later reported to the police station. The officer stated that the defendant admitted that he had seen the girls and offered them a ride, but he denied that he got out of his car or touched the girls.

The defendant testified in his own behalf. He stated that he was 39 years old, resided with his wife and two children and was employed as a field manager for an insurance company. He admitted that he saw the girls in the restaurant and stated that they were giggling between themselves and smiling at him. He denied that he did anything to attract their attention. After the girls left, he finished eating, got into his car and drove around the block. While driving north on Artesian he saw the girls walking south and called from the automobile window to ask them if they wanted a ride. They responded "No," and he proceeded on without getting out of his car or touching the girls.

The defendant contends that he was not proved guilty beyond a reasonable doubt because the girls did not see him leave his car and because the complainant described the car as brown when, in fact, the car was yellow. Further, he maintains that their testimony was not corroborated by any other witnesses to the attack, which allegedly occurred at 1:00 p.m. on a residential street. In addition, Officer Town did not notice any evidence of bite marks or bruises on the defendant when he saw him the next day.

It is well settled that it is the function of the trier of fact to determine the credibility of the witnesses, the weight to be given to their testimony and the inference to be drawn from the evidence. (*People* v. *Akis* (1976), 63 Ill.2d 296, 347 N.E.2d 733.) Here, there is no dispute that the girls saw the defendant in the restaurant and saw him a few minutes later in his car when he offered them a ride. The girls were positive in their identification of the defendant as the assailant, and the record is silent as to whether the officer observed any marks or bruises on the defendant. The trial court was not compelled to accept the defendant's version of the incident. When the evidence is merely conflicting as here, a court of review will not substitute its judgment for that of the trier of fact. *People* v. *Akis, supra.*

The defendant next contends that he did not receive a fair trial because the prosecutor made inflammatory comments which caused the court to improperly consider matters and probabilities not based on the evidence adduced at trial. The record shows that at the end of her closing argument, the prosecutor commented without objection that she wondered what would have happened if the complainant had been alone. Thereafter, the court expressed uncertainty for the reason a 39-year old man would stop and offer a ride to two young girls whom he did not know. It is well settled that where the trial court is the trier of the fact, every presumption will be accorded that the court considered only admissible evidence and discarded inadmissible evidence in reaching

its conclusion. (*People* v. *Robinson* (1964), 30 Ill.2d 437, 197 N.E.2d 45.) The presumption that the court cannot be prejudiced by incompetent evidence can only be rebutted by an affirmative showing by the defendant (*People* v. *Woods* (1976), 41 Ill.App.3d 29, 353 N.E.2d 304), and there will be no reversal unless it affirmatively appears that the court was improperly influenced by such testimony. (*People* v. *Meier* (1975), 30 Ill.App.3d 1, 332 N.E.2d 1.) Here, in commenting upon the defendant's act of offering the girls a ride, the court was clearly considering the defendant's admission at trial that he had done so. There is no indication that the court was influenced by the prosecutor's remark as to what might have happened if the complainant had been alone. Moreover, at the post-trial hearing, it is clearly evident that the court rejected the prosecutor's comments when it stated: "Of course, the Court cannot consider the fact that her friend was alone. . . . This is not a part of the case."

The defendant further contends that when the defense counsel was cross-examining the 13-year-old witness, the court improperly restricted his right to explore the extent of any bias, motive and opportunity for the witness to conform her testimony to that of the complainant. The defense counsel asked the witness if she had talked to the complainant about the incident, to which she replied, "Sometimes." He then asked, "And tell us about how many times you have talked about it?" At this point the prosecutor said: "Objection. She talked to the police, her mother and me too." The court sustained the objection and defense counsel asked no further questions of the witness. The State argues that the questioning was ambiguous in nature. The defense counsel abandoned questioning the witness and made no further attempt to pursue a theory of bias or improper motivation on the part of the witness. The record does not reveal that there was a clear and prejudicial abuse of discretion on the part of the trial court. *People* v. *Gallo* (1973), 54 Ill.2d 343, 297 N.E.2d 569.

Finally, the defendant contends that the sentence was excessive for a man with no prior criminal record. The trial court initially sentenced the defendant to one year; however, at a post-trial hearing the sentence was reduced to a term of six months. The Supreme Court held in *People* v. *Perruquet* (1977), 68 Ill.2d 149, 368 N.E.2d 882, that:

> "Our Rule 615(b)(4) grants reviewing courts the power to reduce the sentence imposed by the trial court. [Citation.] The rule itself does not address the scope of this power or the circumstances under which it should be exercised. However, our decisions have firmly established that the imposition of a sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence of the trial court may not be altered upon review. [Citations.]"

The sentence imposed is within the statutory range. The court was aware of the defendant's prior history. However, it was also aware of the nature of his particular battery. The trial judge listened to all the evidence, inspected all of the witnesses, and was in the best position to assess the seriousness of the offense and the most appropriate punishment. We find that the sentence imposed by the trial court was not an abuse of discretion.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

JIGANTI, *P.J.*, *concurs.*

SIMON, *J.*, concurring in part and dissenting in part:

The trial judge's comments at the time of sentencing indicate that he considered matters in deciding the sentence which were not relevant to that determination. This probably explains the length of the sentence for a battery involving slight physical harm which the defendant—a 39-year-old, employed and married homeowner and father who had no previous record and served honorably

in the armed forces of the United States in Korea during the time of combat there—was given.

The offense with which the defendant was charged and of which he was found guilty was battery. However, comments of the court at the time of the sentencing hearing indicate that the trial judge might have been motivated, at least in part, by his expressed concern that the victim might also have been sexually molested had her companion not intervened. That the trial judge was thinking not only of what happened but of what might have happened is also suggested by his reluctance to postpone the filing of post-trial motions until a date after Labor Day, 1977. The conduct which resulted in the defendant's being found guilty occurred 2 days after the Fourth of July 1977, and the judge's comments suggest that he feared the defendant might repeat his conduct after another holiday weekend. The significance of the trial judge's expressed concern over what might have happened is not lessened by his comment that, "This is not part of the case."

Perhaps the trial judge's concern was not misplaced, but whatever sentence was imposed for the battery should have been based solely on what happened rather than on what might have happened and the harm the victim of the battery could have suffered. The defendant should have been sentenced for a battery which did not involve severe physical contact rather than for a sexual crime which did not occur.

Thus, my study of the record convinces me that too much emphasis was placed on viewing the defendant as a sex offender and too little emphasis on attempting to determine whether his experience taught the defendant a lesson not to repeat his conduct and whether this defendant could best be restored to useful citizenship (Ill. Const. 1970, art. I, sec. 11) by serving a shorter jail sentence or being placed on probation. Accordingly, my opinion is that this matter should be remanded to the circuit court for a new sentencing hearing.

[Opinion Filed: November 15, 1978]

APPENDIX B: Order Of Appellate Court Of Illinois Denying Petition For Rehearing

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

No. 77-1642

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ROBERT G. MYTNIK,

Defendant-Appellant.

ORDER

IT IS HEREBY ORDERED that appellant's Petition for Rehearing be and the same is hereby denied.

Dated at Chicago, Illinois, this 13th day of December, 1978.

ENTER:

/s/ M. R. Jiganti
Justice

/s/ Helen F. McGillicuddy
Justice

APPENDIX C: Notice Of Order Of Illinois Supreme Court Denying Petition For Leave To Appeal

No. 51576 - People State of Illinois, respondent, vs. Robert G. Mytnik, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

[Dated: March 29, 1979]

APPENDIX D: Notice Of Order Of Illinois Supreme Court Issuing Mandate

April 23, 1979

To Attorneys Of Record And Parties:

You are hereby notified that the mandates in the cases listed below were today issued to the appropriate Appellate Court Clerks:

Clell L. Woods
Clerk of the Supreme Court

• • •

No. 51576 - People State of Illinois, respondent, vs. Robert G. Mytnik, petitioner. Leave to appeal, Appellate Court, First District.

APPENDIX E: Order Of Appellate Court Of Illinois Granting Petitioner's Motion To Stay Mandate

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

No. 77-1642

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ROBERT G. MYTNIK,

Defendant-Appellant.

Appeal from Circuit Court of Cook County,
Municipal Department, First District.

ORDER

Defendant-Appellant ROBERT G. MYTNIK'S *Motion to Stay Mandate* is granted.

/s/ Seymour Simon
Justice

/s/ Helen F. McGillicuddy
Justice

/s/ M. R. Jiganti
Justice

Dated: May 2, 1979

No. 78-1913

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROBERT G. MYTNIK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 78-1913

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROBERT G. MYTNIK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The preceding opinion of the Illinois Appellate Court has been previously submitted to this Court as an Appendix to the Petition for Writ of Certiorari and therefore is not contained in this brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound discretion to grant his Pètition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether a trial court abuses its discretion when he sentences a defendant to six months imprisonment after that defendant is convicted of a crime for which the statute proscribes a sentence of imprisonment "for any term less than one year . . ."

STATEMENT OF THE CASE

The defendant was tried in a bench trial before Judge Calvin C. Campbell and was convicted on a charge of battery. A sentence of six months incarceration was imposed after trial and after a hearing on post-trial motions for a new trial and a reduction of sentence.

The Crime

Laura Spalla, a 12-year-old girl (R. 3), and her friend Erin O'Doheiety, 13 years old (R. 8), were sitting in Red's Grill at about 1:00 p.m. on July 6, 1977. (R. 9-10) The defendant, identified in court by both girls, was sitting in Red's at that time. (R. 10; R. 5) The girls testified that during the time they were sitting in Red's, the defendant was making noises at them, trying to gain their attention, and winking at them whenever they did acknowledge him. (R. 10) For the most part the girls tried to ignore him. (R. 10)

Laura and Erin left Red's, and went to a drugstore across the street, where they stayed only five minutes. (R. 11) They then went past Red's and walked down Artesian. (R. 11) Erin stopped at the corner of 119th Street and Artesian (R. 11) while Laura continued on south down Artesian. (R. 11)

The defendant drove up to Laura and asked here where she was going. (R. 5) The young girl asked the defendant why

he wanted to know, and he answered by inquiring whether she needed a ride. (R. 5) Laura replied "no" and the defendant asked her for directions. (R. 5) Laura started walking when the defendant, now out of his car, came up and pulled the girl's arm, grabbing her from the back. (R. 5-6)

Erin, who had stopped to pet a dog, heard Laura yell "no." (R. 11) She turned, and saw the defendant pulling her friend Laura to his car. (R. 11) Erin ran up and jumped on the defendant's back. (R. 11) He let go of Laura, and Erin slid down his back. (R. 12) The defendant turned around and grabbed Erin's arm, in response to which she bent his hand back. (R. 13)

While the defendant held on to Erin, Laura went back to him and started pinching his arms (R. 7) while he began pulling Laura again. (R. 13) At that point the defendant let go of the girls, said "okay girls," got into his car and drove off, northbound on Artesian. (R. 13; R. 7)

Laura took down the license number of the defendant's car as it drove away. (R. 7) The girls went to the nearby park and told a policeman there what had happened from the time they were at Red's. (R. 13)

On cross-examination, defense counsel asked Erin if she had discussed the incident with Laura, to which she replied "Sometimes." (R. 16) Counsel then asked her how many times she had talked about it. (R. 17) This question was objected to, the prosecutor noting its ambiguity by stating "She talked to the police, her mother and me too." (R. 17) The objection was sustained, and counsel abandoned any further cross-examination of the witness. (R. 17)

Officer William Town testified that he spoke with Laura Spalla at 1:00 p.m. on July 7th. (R. 18) Subsequently a license check was made of the plate number which Laura had noted on the defendant's car, and it was discovered that the car with that license was registered to a company. (R. 18) Town contacted

this company and informed them that one of their company cars had been used in an incident. (R. 19) After a check, the company called Town back and told him the man who had been driving that car would come to the police station. (R. 19)

After having been advised of his rights, the defendant told Town that he was in fact in the area of the incident the previous day. (R. 20) He admitted that he had seen the girls at Red's on the 6th and that he was on company business at the time. (R. 23-24) He stated, however, that he never got out of his car and never touched the girls. (R. 24) The two girls later identified the defendant after seeing him at the station. (R. 21)

The defendant testified that on July 6th, he was employed at the Zurich Insurance Company, driving a company car, a yellow Chevrolet. (R. 25) At 1:00 p.m. on that day, he was in Red's Grill, at the corner of Western and 111th Street. (R. 26) He had gone in and ordered two sandwiches when he saw about five young girls giggling and laughing at another table. (R. 26) They looked at him and smiled, and he smiled back at them. (R. 26) The girls then left. (R. 26) The defendant testified that he did not try to attract their attention, nor did he make noises at them. (R. 27) He got into his car and drove around the block when he saw the girls between 111th and 112th Streets on Artesian, walking south. (R. 27) At that time, there were only two girls. (R. 28)

The defendant said he pulled his car over and asked them "if they wanted a ride some place." (R. 29) The defendant's car was in the middle of the street. (R. 30) The girls, standing on the sidewalk, said they did not want a ride, and it was the defendant's testimony that he then just proceeded on. (R. 30) He stated that he never got out of his car, never approached the girls, and never bothered them. (R. 30) Further, he said that he was contacted by his boss the next day concerning this incident; that he went to the police station; and that he told the police officer exactly that to which he had testified. (R. 31-32)

Although the defendant was driving north when he saw the girls, who were walking south, and the defendant at the time was on company business, he was able to give no reason why he was going to change his direction to give them a ride south. (R. 33) The defense rested with the defendant's testimony.

In closing argument, the prosecutor stated:

> I wonder what would of (sic) happened if Laura had been out there all by herself that day . . . (R. 39)

The Court, after hearing all of the evidence, found the defendant guilty, stating:

> The court does not view this as a laughing matter. The court views this matter as a very serious charge. It is not clear to the Court as to why a thirty-nine-year-old man would stop two young ladies who he did not know and ask to give them a ride.
>
> The State has proven the burden that it is obligated to prove and there will be a finding of guilty. (R. 39)

The State asked for a sentence of one year imprisonment, noting the type of offense and the ages of the girls. (R. 40) Emphasizing in mitigation his military record, his family, employment, and the absence of any prior arrests, the defendant asked for supervision. (R. 40-41) A sentence of one year was imposed (R. 41), and was later reduced to six months (R. 70).

REASONS FOR DENYING THE WRIT

WHERE THE PETITIONER WAS CONVICTED OF BATTERY FOR HIS PHYSICAL ATTEMPT TO FORCIBLY DRAG A TWELVE-YEAR-OLD GIRL INTO HIS CAR AGAINST HER WILL, THE SENTENCE OF SIX MONTHS INCARCERATION, OR ONE-HALF OF THE STATUTORY MAXIMUM, WAS NOT AN ABUSE OF THE COURT'S DISCRETION. THIS IS PARTICULARLY TRUE WHERE THIS TWELVE-YEAR-OLD GIRL HAS SUFFERED NIGHTMARES AND NERVOUSNESS AS A RESULT OF THE UNPROVOKED ATTACK.

It is fundamental that a sentence imposed by a trial judge, if within statutory limits, is generally not subject to review. This legal concept is true in both the federal courts, United States v. *Tucker*, 404 U.S. 443 (1972), and the courts of Illinois, *People* v. *Perruquet*, 68 Ill. 2d 149 (1977).

In this case the defendant requests this Court to exercise its discretionary power of certiorari to review a simple sentencing situation. Defendant argues that the trial judge in this case based the six-month jail sentence, in part, upon statements made by the People's attorney. Simply stated, the defendant ignores the record in this case.

The defendant claims that the sentence of six months incarceration, one-half of the statutory maximum, was excessive. It is the position of the People that this sentence was not excessive, given the nature of this attempt to drag a 12-year-old girl into the car of a 39-year-old man when she would not voluntarily consent to ride with him, where the victim was saved only by the presence of her friend, and where she has suffered nightmares and nervousness since the attack; and the sentence was well within the trial court's discretion.

As the Supreme Court of Illinois has held in *People* v. *Perruquet*, 68 Ill. 2d 149, 368 N.E.2d 882 (1977), sentences will not be reduced by a reviewing court absent a showing of

clear abuse of discretion. Here, where the sentence imposed on the defendant was within the statutory range, indeed, only one-half of the maximum, there is clearly no such abuse of discretion.

The defendant makes much of his impeccable record, his steady employment, and his family. Unquestionably, these factors were before the judge and considered by him. But while the defendant may choose to ignore the nature of his crime, an unprovoked attack on a 12-year-old girl, indeed, an attempt to physically and forcibly force her into his car against her explicit refusal to do so, neither the People nor the court below nor this court can so ignore these facts which render this crime particularly disturbing. The trial judge was fully justified in noting the severity of the offense and the dangers it posed. As the prosecutor pointed out:

> The State would be asking for a period on one year in the House of Corrections because of the type of offense and because of the ages of the girls. There was absolutely nothing to provoke the incident. (R. 40)

And later, in direct reference to defense counsel's argument in mitigation regarding the defendant's family:

> Counsel, another thing that occurred to me is that the defendant has two children. One ten years and one twelve years of age. He did not indicate if they were male or female, but I certainly wonder if someone offered to give these two children a ride, under the circumstances, I do not think the sympathy warrants in this particular instance. (R. 41)

The defendant is perfectly correct in setting out those factors which the judge must take into account in passing sentence. What the defendant fails to note sufficiently is that the trial judge sat through the trial, heard the evidence, saw the witnesses, and was in the best position to assess the seriousness of the offense in light of all of the aggravating and mitigating

factors. As the court below concluded, "The Court does not view this as a laughing matter. The Court views this matter as a very serious charge." (R. 39)

Indeed, a review of the testimony and arguments made on the motion for a reduction of sentence demonstrates that, while the trial court had before it and considered all matters in mitigation, the defendant argued for a reduction on an incomplete, misleading basis. "To talk about deterrents, Your Honor. This man has certainly been deterred from the idea of trying to offer a ride to a girl by what happened to him." (R. 18) The defendant, however, was not convicted of offering a ride to a girl, but of physically trying to force a 12-year-old girl to 'ride' with him against her explicit wish. Has he been deterred from that? Defense counsel had nothing to say on this.

Defendant makes much of the fact that the trial judge gave thought to what might have happened had the victim been alone when she was attacked by the defendant. The judge, however, was most careful to point out that the above "was not a part of the case." (R. 26) This statement alone shows that the judge confined himself to relevant matters when he sentenced the defendant.[1]

Even further, the sentence was originally set at one year. However, the defendant produced testimony underlining the

[1] The defendant cites cases where sentences for battery were reduced on review. Suffice it to say that none of those cases involved an unprovoked attack on a 12 year old girl, nor an attack of such questionable and thus frightening motive. Further, those cases cite the absence of injury. The People submit that the defendant's attack on Laura Spalla has left permanent, scarring injury. As the victim's mother told the court:

> I just wanted to say because of this incident, my daughter has had nightmares. She thinks every man she sees whether she is walking through her own park in her own neighborhood, has an alterior (sic) motive. I think it has made her afraid when she shouldn't of (sic) been. (R. 65)

economic dependence of the defendant's family on him. The judge reduced the sentence to six months.

> The Court is concerned about the matter of the sentence and particularly not so much for the sympathy of the defendant, but for the family that is left.
>
> In this respect, the Court imposed a one year sentence on the defendant. The Court was of the opinion that the defendant should spend some time in the House of Correction. . . .
>
> Because of the economic matters that are involved here, the Court will reduce the sentence to six months. . . . This is not for the benefit of the defendant. . . . The Court is not impressed that he should be released, and the Court is not prepared to release the defendant alone. (R. 70-71)

From all of the above, it is clear that the court took all matters into consideration, found the defendant's crime to be a very serious one, and then fairly, in exercise of the soundest judicial discretion, sentenced the defendant to six months. There can be found no such flagrant abuse of discretion in this sentence to warrant this Court to entertain this case on certiorari.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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